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A

KEU Control Engineering Sdn Bhd v Toh Sie Ban (trading under the name and style of TSB Construction Co)

B

HIGH COURT (SIBU) — CIVIL APPEAL NO SBW-12B-1/3 OF 2013
SUPANG LIAN J
28 MARCH 2014

C

Civil Procedure — Pleadings — Amendment — Respondent denied appellant's defence that it did not carry out works according to appellant's plans — Respondent pleaded works were done according to appellant's plans — Testimonies of respondent's witnesses at trial departed from pleaded case and asserted appellant never provided relevant plans — Trial judge accepted witnesses and testimonies as credible and gave judgment to respondent — Respondent applied before hearing of appeal against decision to amend pleadings to say works were not carried out according to plans provided by appellant — Whether amendment would negate appellant's ground of appeal that respondent's witnesses were not credible for departing from pleaded case — Whether allowing of amendment would cause injustice to appellant which could not be compensated for by costs

D

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The respondent sued the appellant in the sessions court for monies unpaid on roofing construction works it had done for the appellant. In its defence, the appellant pleaded, inter alia, that the respondent breached the contract by failing to build in accordance with plans and specifications it had provided. In its reply to the defence, the respondent averred that it did perform the works according to the appellant's plans and specifications. At the trial, two of the respondent's witnesses, PW1 and PW2, departed from that averment and testified that the appellant had never provided the respondent with the plans of the wooden truss of the roofing. The trial court, nevertheless, accepted PW1 and PW2 as credible witnesses and gave judgment to the respondent. One of the appellant's grounds of appeal to the High Court against that decision was that the trial judge erred in law and fact in accepting the two witnesses as credible in spite of their testimonies departing from the respondent's pleaded case. Pending the hearing of the appeal, the respondent in its instant application sought leave to amend its pleadings to delete the averment that it had carried out the works according to the plans and specifications provided by the appellant. The respondent submitted that the amendment was necessitated by the evidence adduced at the trial and if the application was allowed it would not cause such injustice to the appellant which could not be compensated for by an order for costs. This was especially as the appellant had never objected at the trial when the testimonies of PW1 and PW2 departed from the respondent's pleaded case; hence, the appellant would not be misled, prejudiced, embarrassed, led astray or in any way be taken by surprise if the

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amendment was allowed. The appellant opposed the application on the ground it sought to change the character of the respondent's suit into one which was wholly different and inconsistent with the original pleading and, as such, the amendment would cause the appellant to suffer an injustice which could not be compensated for by costs.

Held, dismissing the application:

(1) Despite the testimonies of PW1 and PW2 markedly departing from the respondent's pleaded case, the trial judge had considered them to be credible, accepted their evidence and decided the case in favour of the respondent based on the evidence and the pleadings as they stood at trial. It was this determination by the trial judge that was at the heart of the appeal against his decision. It would be unprecedented if the court were to allow the respondent to retrospectively rectify the very pleading upon which the appellant had premised its arguments and contentions against the acceptance by the trial judge of PW1 and PW2 as credible witnesses. Allowing the amendment would cause injustice to the appellant which no amount of costs could compensate (see para 8).

(2) In its written submissions, the respondent had conceded that its evidence at trial, that the appellant never provided it with the wooden truss plan, was a departure from its pleaded case. There was no denying the fact the respondent's case at the outset was that the appellant had provided the plan for the wooden truss. The contention that such plan was not provided only surfaced at the trial (see para 7).

[Bahasa Malaysia summary

Responden menyaman perayu di mahkamah sesyen untuk wang yang tidak dibayar atas kerja pembinaan bumbung yang dibina untuk perayu. Dalam pembelaannya, perayu memplid, antara lain, bahawa responden memungkiri kontrak kerana gagal untuk membina mengikut pelan dan spesifikasi yang diberikannya. Dalam jawapannya kepada pembelaan, responden menghujah bahawa yang dia melakukan kerja mengikut kepada pelan dan spesfikasi perayu. Pada masa perbicaraan, dua daripada saksi-saksi responden, PW1 dan PW2, menyimpang daripada hujahan dan memberi keterangan bahawa perayu tidak pernah memberikan responden pelan kekuda kayu bumbung. Mahkamah perbicaraan, walau bagaimanapun menerima PW1 dan PW2 sebagai saksi-saksi yang boleh dipercayai dan memberi penghakiman kepada responden. Salah satu daripada alasan rayuan kepada Mahkamah Tinggi terhadap keputusan adalah bahawa hakim bicara tersilap dari segi undang-undang dan fakta dalam menerima dua saksi sebagai saksi yang boleh dipercayai meskipun keterangan mereka menyimpang daripada kes yang diplid responden. Sementara menunggu pendengaran rayuan, responden dalam permohonannya memohon izin untuk meminda plidingnya untuk memadam penghujahan bahawa ia menjalankan kerja mengikut pelan dan

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spesifikasi yang diberikan oleh perayu. Responden berhujah bahawa pemindaan adalah perlu kerana keterangan yang dikemukakan pada masa perbicaraan tersebut dan jika permohonan dibenarkan ia tidak akan menyebabkan ketidakadilan kepada perayu yang tidak dapat diberikan pampasan akibat perintah untuk kos. Ini adalah terutamanya kerana perayu tidak pernah membantah pada masa perbicaraan apabila keterangan PW1 dan PW2 menyimpang daripada kes yang diplidkan responden; maka, perayu tidak akan dikelirukan, diprejudis, dimalukan, sesat atau dalam apa cara akan terkejut jika pemindaan dibenarkan. Perayu membantah permohonan atas alasan ia memohon untuk karakter tindakan responden kepada satu yang berbeza keseluruhannya dan tidak konsiten dengan pliding asal dan, oleh itu, pemindaan akan menyebabkan perayu mengalami ketidakadilan yang tidak boleh diberikan pampasan oleh kos.

Diputuskan, menolak permohonan:

(1) Meskipun keterangan PW1 dan PW2 secara ketara menyimpang daripada kes yang diplidkan responden, hakim bicara telah mempertimbangkan ia boleh dipercayai, menerima keterangan mereka dan memutuskan kes memihak kepada responden berdasarkan keterangan dan pliding semasa mereka dibicarakan. Adalah penentuan oleh hakim bicara ini adalah punca rayuan terhadap keputusannya. Tidak pernah berlaku dahulu, jika mahkamah membenarkan responden untuk membetulkan secara retrospektif pliding di mana perayu mendasarkan hujahannya dan hujahan terhadap penerimaan oleh hakim bicara terhadap PW1 dan PW2 sebagai saksi-saksi yang boleh dipercayai. Membenarkan pemindaan akan menyebabkan ketidakadilan kepada perayu di mana tiada jumlah wang yang dapat mengimbanginya (lihat perenggan 8).

(2) Dalam penghujahan bertulisnya, responden telah mengakui bahawa keterangannya semasa perbicaraan, bahawa perayu tidak pernah memberikannya pelan kekuda kayu, adalah penyimpangan daripada kes yang diplidnya. Tidak dapat dinafikan fakta bahawa kes responden pada permulaannya adalah bahawa perayu telah memberikan pelan untuk kekuda kayu. Hujahan bahawa pelan sedemikian tidak diberikan hanya timbul pada masa perbicaraan (lihat perenggan 7).]

Notes

For cases on amendment, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6453–6579.

Cases referred to

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230; [1987] CLJ Rep 126, SC (refd)

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Siti Aisha binti Ibrahim v Goh Cheng Hwai [1982] 2 MLJ 124; [1982] CLJ Rep 326, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] CLJ Rep 428, FC (refd)

William Ting Siew Chon (Tang & Partners Advocates) for the appellant.
Wong Ho Leng (George Lau with him) (Wong Ho Leng & Co) for the respondent.

Supang Lian J:

JUDGMENT (ENCL 20)

[1] The respondent is the plaintiff at the sessions court whereas the appellant is the defendant. The claim of the respondent against the appellant was for RM175,539.20 being the balance price of roofing construction works done at the request of the appellant vide purchase order dated 16 September 2009 on the appellant's proposed 20 units of staff housing quarters. In their defence, the appellant had pleaded, inter alia, that the respondent was in breach of contract by failing to build in accordance to the plans and specifications provided by the appellant. In para 2 of the reply dated 9 April 2012, the respondent had pleaded as follows: The Plaintiff avers that he had performed the said works according to the plans and specifications provided by the Defendant, and there had been no complaint from the Defendant or at all until the commencement of the proceedings'. At the trial the two witnesses of the respondent ('PW1' and 'PW2') gave evidence that the appellant never provided the respondent with the plans of the wooden truss of the roofing. This was a departure from the aforesaid pleading in para 2 of the reply of the respondent. The learned sessions court judge nevertheless accepted PW1 and PW2 as more credible and gave judgment in favour of the respondent. The appellant had filed notice of appeal against the decision of the sessions court on 13 March 2013. One of the grounds of appeal is that the trial judge had erred in law and fact in accepting PW1 and PW2 as credible witnesses in view that their evidence in court was a departure from the pleaded case of the respondent.

[2] By the present application filed on 27 September 2013, the respondent applies for leave to amend para 2 of the reply by deleting the words 'according to the plans and specifications provided by the Defendant' therein. The grounds of application are that the amendment arises out of the evidence of the parties to the suit adduced at the trial in the sessions court and the appellant will not suffer any injustice that cannot be compensated by an order as to costs. The appellant opposed the application on grounds that the proposed amendment would have the effect of changing the nature of the respondent's case from one of admitting that the respondent had performed the works according to the plan provided by the appellant to a defence that no plan at all

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was provided by the appellant. This will cause injustice to the appellant which could not be compensated by costs.

[3] It is contended for the respondent that 'since the first minute' his case has been that the appellant did not provide the plan of the wooden truss for the roofing construction or the works. The respondent submits that the evidence of this stance of the respondent is contained in the witness statements of PW1 and PW2 (see pp 80 and 84 of the appeal record). The respondent says that in the only plan discovered by the appellant for the purpose of the trial in the court below, the appellant admitted that they did not provide the respondent with the wooden truss plan. According to the respondent the appellant's purported admission of this fact can be seen at p 47, Q 53 of the appeal record. Furthermore, the appellant never raised any objection when PW1 and PW2 gave evidence at the trial that there was no plan for wooden truss provided by the defendant. As such, their evidence must be taken as true on the authority of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC).

[4] It is of significance that the respondent concedes that the evidence of PW1 and PW2 that the appellant had never provided the respondent with the plan for the wooden truss was a departure from the respondent's pleading in the reply. However, the respondent submits that such departure from the pleading only goes to the issue of credibility. The respondent refers to the decision of *Siti Aisha binti Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124; [1982] CLJ Rep 326 where the plaintiff pleaded in her statement of claim that she was 'lawfully walking along the proper side of the road' while in her evidence in court she said she was walking across the road. Moreover, in her police report (exh P1) she stated she was crossing the road. The defendant in his defence and at the trial also stated that the plaintiff was walking across the road and not along the road. It was alleged, inter alia, on appeal that the plaintiff's failure to abide by her pleadings was fatal and her claim should therefore be dismissed. The Federal Court held that it is clear that the defendant was not misled, prejudiced or embarrassed or in any way taken by surprise or led astray by the plaintiff's pleading because from the very outset it was the contention and the case for the defendant that the plaintiff was walking across the road and not along the road. Based on this decision, the respondent in our present case deems it necessary to apply to amend para 2 of the reply by deleting the words 'according to the plans and specifications provided by the Defendant'. According to the respondent, the appellant would not be misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the amendment.

[5] In *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213 at pp 215–216; [1983] CLJ Rep 428 at pp 429–430 Mohd Azmi FJ stated as follows:

> The general principle is that the court will allow such amendments as will cause no

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> injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result (1) whether the application is bona fide (2) whether prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

[6] Likewise in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230; [1987] CLJ Rep 126 (SC), Syed Agil Barakbah SCJ stated at pp 236 (MLJ); 131–132 (CLJ):

> Generally speaking, the overriding principle with regard to amendments is that they will be allowed at any stage of the proceedings on such terms as to costs or otherwise as the court thinks just. However, the court will refuse leave to allow such amendments if it results in prejudice or injury to the other party which cannot be properly compensated by costs. The object of allowing amendments at any stage of the proceedings is to enable the party to present his case properly at the trial. Amendments ought to be made to enable the court to determine the real question in controversy between the parties or of correcting any defect or error in any proceedings. In considering any amendment, the court will have regard to any undue delay or whether the application is made mala fide or whether such amendment will in any way unfairly prejudice the other party.

[7] With respect, the contention of the respondent that it was his case 'since the first minute' that the appellant had not provided the respondent with the wooden truss plan is fallacious. The reason for this is clear. The express pleading in para 2 of the reply of the respondent which is dated 9 April 2012 is that the respondent had performed the works according to the plans and specifications provided by the appellant. Moreover, the respondent in his written submission had conceded that the evidence adduced at the trial that the respondent was never provided with the wooden truss plan was a departure from his own pleading. To my mind, there can be no denying that at the beginning the case for the respondent was that the appellant provided the plan for the wooden truss. The case for the respondent that such plan was not provided had only surfaced at the trial.

[8] I also disagree with the respondent that the appellant would not be unfairly prejudiced by the amendment sought. The trial of the action in the lower court is over and the questions for determination decided by the trial court and judgment delivered. The trial court had come to a determination of the issues based on the state of the pleadings as they were at the trial and based on the whole of the evidence adduced before him. As the parties had pointed

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out, the trial judge had considered the issue of credibility of PW1 and PW2. Despite the marked departure from the pleaded case in the reply, the trial judge accepted the evidence of PW1 and PW2 and ruled for the respondent. It is this determination by the trial judge that is the heart of the dissatisfaction of the defendant giving rise to the appeal. In my view, it would be unprecedented for the court to allow the respondent to retrospectively rectify the very pleading upon which the appellant, as the defendant at the trial in the court below, had premised its arguments and contentions against accepting PW1 and PW2 as credible witnesses. To my mind, allowing the respondent the amendment it seeks which would effectively rectify the pleading would cause injustice to the appellant which no amount of an award of costs could compensate.

[9] I feel fortified in the view that I take by drawing a parallel with the decision of *Siti Aishah*, the case cited by the respondent. It is to be noted that in that case, the trial court, acting on the evidence of the plaintiff (which was a departure from the pleaded case), other witnesses, the sketch plan and the police photographs, had found the defendant negligent and the plaintiff guilty of contributory negligence. Hence, liability was apportioned at 50:50. On appeal by the defendant, the High Court allowed the appeal but for different reasons. The learned High Court judge said that he appreciated that the plaintiff's evidence was contrary to her pleadings but in view of other findings he did not think it necessary to lay too much emphasis on technicalities. The Federal Court held that in the circumstances of the case, the trial court was entitled to consider the case having regard to the whole of the evidence and to decide it in a manner as was just between the parties. Further, in view that the question for determination by the trial court was essentially one of fact, the finding of the trial court should not have been disturbed as there was no valid reason to show that the trial judge had not taken advantage of his having seen and heard the witnesses. What is clear in *Siti Aishah*'s case above is that at no time was it considered necessary either by the plaintiff herself or the trial court, the High Court or the Federal Court that the statement of claim of the plaintiff ought to be or should be amended to suit the evidence of the plaintiff adduced at the trial. To my mind, the reason for this is clear. The determination of the case by the trial court was based on the evaluation of the whole of the evidence adduced at the trial vis a vis the pleadings (in particular the statement of claim). Thus, there could be no question of the statement of claim being allowed to be amended retrospectively. In my judgment, the decision of *Siti Aishah* supports the contentions of the respondent in as much as it lays down that there is no bar to the court, on valid grounds, accepting and acting on evidence adduced at the trial without objection not withstanding it is a departure from the pleaded case. The decision does not support the case for the respondent that it should be allowed to amend the pleading from which the witness had departed during the trial.

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[10] For the reasons stated above, the application of the respondent to amend the reply in the manner stated is not allowed. The application is dismissed with costs of RM1,000 to the appellant.

Application dismissed.

Reported by Ashok Kumar